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Attorney for NCO Financial Systems, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEFFREY MOLNAR, WESLEY
THORNTON, and AILEEN
MARTINEZ on behalf of themselves, all
others similarly situated and the general
public,

Plaintiffs,

vs.

NCO FINANCIAL SYSTEMS, INC., a
Pennsylvania Corporation

Defendant.

Case No. 13-CV-0131JLS-WMC

NCO FINANCIAL SYSTEMS, INC.'S
ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFFS' FIRST
AMENDED COMPLAINT

Defendant, NCO Financial Systems, Inc. (hereinafter "NCO"), for itself
alone, responds to the First Amended Complaint filed by Plaintiffs, Jeffrey Molnar
and Wesley Thornton ("Plaintiffs"), as follows:

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INTRODUCTION

1. NCO admits that Plaintiffs purport to seek redress for alleged violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.*, as alleged in ¶ 1 of the Complaint. Except as expressly admitted herein, NCO denies the remaining allegations contained in ¶ 1.

JURISDICTION AND VENUE

2. NCO admits the allegations contained in ¶ 2 for jurisdiction purposes only.

3. NCO denies the allegations contained in ¶ 3 as calling for a legal conclusion.

4. NCO denies that venue is proper. *See* 28 U.S.C. 1391. NCO admits that it is registered to do business in California, and that it conducts business in California. Except as expressly admitted herein, NCO denies the remaining allegations contained in ¶ 4.

PARTIES

5. NCO denies the allegations contained in ¶ 5 for lack of sufficient information to justify a reasonable belief therein and as calling for a legal conclusion.

6. NCO denies the allegations contained in ¶ 6 for lack of sufficient information to justify a reasonable belief therein and as calling for a legal conclusion.

7. NCO denies the allegations contained in ¶ 7 for lack of sufficient information to justify a reasonable belief therein and as calling for a legal conclusion.

1 8. NCO admits that it is a Pennsylvania corporation. Except as
2 specifically admitted, NCO denies the allegations contained in ¶ 8 as calling for a
3 legal conclusion.

4 9. NCO admits that it is a Pennsylvania corporation as alleged in ¶ 9.
5 NCO further admits that it is registered to do business in the State of California,
6 and that it does business in California. NCO admits it conducts debt collection
7 related services in California. Except as expressly admitted, NCO denies the
8 allegations contained in ¶ 9.

9 10. NCO admits that it conducted business in State of California, the
10 County of San Diego, and this judicial district and that it collects debts throughout
11 the United States. Except as expressly admitted, NCO denies the allegations
12 contained in ¶ 10.

13 11. NCO denies the allegations contained in ¶ 11 for lack of sufficient
14 information to justify a reasonable belief therein.

15 12. NCO admits that it conducted business in State of California, the
16 County of San Diego, and this judicial district. Except as expressly admitted, NCO
17 denies the allegations contained in ¶ 12.

18 **FACTUAL ALLEGATIONS**

19 **Facts Relating to Plaintiff Molnar**

20 13. NCO denies the allegations contained in ¶ 13.

21 14. NCO denies the allegations contained in ¶ 14.

22 15. NCO denies the allegations contained in ¶ 15.

23 16. NCO denies the allegations contained in ¶ 16.

24 17. NCO denies the allegations contained in ¶ 17.

25 18. NCO admits the allegations contained in ¶ 18.

19. NCO denies the allegations contained in ¶ 19.

Facts Relating to Plaintiff Thornton

20. NCO denies the allegations contained in ¶ 20 for lack of sufficient information to justify a reasonable belief therein.

21. NCO denies the allegations contained in ¶ 21.

22. NCO denies the allegations contained in ¶ 22.

23. NCO denies the allegations contained in ¶ 23 for lack of sufficient information to justify a reasonable belief therein.

24. NCO denies the allegations contained in ¶ 24.

25. NCO admits the allegations contained in ¶ 25.

26. NCO denies the allegations contained in ¶ 26.

Facts Relating to Plaintiff Martinez

27. NCO denies the allegations contained in ¶ 27 for lack of sufficient information to justify a reasonable belief therein.

28. NCO denies the allegations contained in ¶ 28 for lack of sufficient information to justify a reasonable belief therein.

29. NCO denies the allegations contained in ¶ 29.

30. NCO denies the allegations contained in ¶ 30 for lack of sufficient information to justify a reasonable belief therein.

31. NCO denies the allegations contained in ¶ 31.

32. NCO admits the allegations contained in ¶ 32.

33. NCO denies the allegations contained in ¶ 33.

CLASS ACTION ALLEGATIONS

34. NCO admits that Plaintiffs bring this Class Action lawsuit on behalf of themselves and on behalf of a class, but denies any wrongdoing or violations of

1 any statutes to the extent alleged in ¶ 34 and further denies that this lawsuit meets
2 the requirements of a class action.

3 35. NCO denies the allegations in ¶ 35 and further denies that this lawsuit
4 meets the requirements of a class action.

5 36. NCO denies the allegations in ¶ 36 and further denies that this lawsuit
6 meets the requirements of a class action.

7 37. NCO denies the allegations in ¶ 37 and further denies that this lawsuit
8 meets the requirements of a class action.

9 38. NCO denies the allegations in ¶ 38 and further denies that this lawsuit
10 meets the requirements of a class action.

11 39. NCO denies the allegations in ¶ 39 and further denies that this lawsuit
12 meets the requirements of a class action.

13 40. NCO denies the allegations in ¶ 40, including sub-parts (a) through
14 (c), and further denies that this lawsuit meets the requirements of a class action.

15 41. NCO denies the allegations in ¶ 41 and further denies that this lawsuit
16 meets the requirements of a class action.

17 42. NCO denies the allegations in ¶ 42 and further denies that this lawsuit
18 meets the requirements of a class action.

19 43. NCO denies the allegations in ¶ 43 and further denies that this lawsuit
20 meets the requirements of a class action.

21 44. NCO denies the allegations in ¶ 44 and further denies that this lawsuit
22 meets the requirements of a class action.

23 45. NCO denies the allegations in ¶ 45 and further denies that this lawsuit
24 meets the requirements of a class action.

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FIRST CAUSE OF ACTION
NEGLIGENT VIOLATIONS OF THE TELEPHONE
CONSUMER PROTECTION ACT

47 U.S.C. § 227 ET SEQ.

46. NCO reasserts the foregoing as if fully incorporated herein.
47. NCO denies the allegations in ¶ 47.
48. NCO denies the allegations in ¶ 48.
49. NCO denies the allegations in ¶ 49.

SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT

47 U.S.C. § 227 ET SEQ.

50. NCO reasserts the foregoing as if fully incorporated herein.
51. NCO denies the allegations in ¶ 51.
52. NCO denies the allegations in ¶ 52.
53. NCO denies the allegations in ¶ 53.

PRAYER FOR RELIEF

54. NCO denies that Plaintiffs are entitled to the relief sought.
55. NCO denies that Plaintiffs are entitled to the relief sought.
56. NCO denies that Plaintiffs are entitled to the relief sought.
57. NCO denies that Plaintiffs are entitled to the relief sought.
58. NCO denies that Plaintiffs are entitled to the relief sought.
59. NCO denies that Plaintiffs are entitled to the relief sought.

JURY DEMAND

60. NCO admits that Plaintiffs have requested a jury trial.

1 SIXTH AFFIRMATIVE DEFENSE

2 As a sixth affirmative defense, NCO alleges that some of the calls it
3 allegedly made were manual not dialer calls. Further, the dialer that NCO uses is
4 not an ATDS as defined by the TCPA.

5 SEVENTH AFFIRMATIVE DEFENSE

6 As a seventh affirmative defense, NCO alleges that 1 or more of the alleged
7 calls were not to a wireless a/k/a mobile a/k/a cellular phone number.

8 EIGHTH AFFIRMATIVE DEFENSE

9 As an eighth affirmative defense, NCO alleges that Plaintiffs' Complaint
10 should be dismissed for failure to mitigate, estoppel, waiver, unclean hands, and/or
11 assumption of risk. One or more of the Plaintiffs did not write or call NCO to
12 curtail or stop the alleged phone calls. Rather, he/they "sat on his/their hands," did
13 nothing, and allowed the alleged calls and any resulting statutory damages to
14 accrue. Plaintiffs communicated no dispute, cease and desist, or objection to NCO.
15 Without more than nominal expense and/or effort, Plaintiffs could have and should
16 have either wrote or answered an alleged call or returned a message and requested
17 that the alleged calls stop or be directed to a different number. Plaintiffs further
18 knowingly and intentionally allowed and facilitated the calls to continue with the
19 sole purpose to accumulate alleged statutory damages under the TCPA.
20

21 NINTH AFFIRMATIVE DEFENSE

22 As a ninth affirmative defense, NCO alleges that any harm suffered by
23 Plaintiffs was legally and proximately caused by persons or entities other than
24 NCO and was beyond the control or supervision of NCO or for whom NCO was
25 and is not responsible or liable.
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ELEVENTH AFFIRMATIVE DEFENSE

As an eleventh affirmative defense, NCO alleges that some of the alleged calls are barred by a release.

As an eleventh affirmative defense, NCO alleges that some of the alleged calls are barred by a release.

NCO currently has insufficient information upon which to form a belief as to whether it has additional affirmative defenses available. NCO reserves its right to assert additional affirmative defenses in the event investigation and discovery indicate they would be appropriate.

1. Plaintiff takes nothing by way of his Complaint;
2. Judgment of dismissal be entered in favor of NCO;
3. NCO be awarded costs and attorney's fees it has incurred in defending this lawsuit.
4. NCO be granted such other and further relief as the Court deems just and proper.

/s/Debbie P. Kirkpatrick
Debbie P. Kirkpatrick
Attorney for Defendant
NCO Financial Systems, Inc.